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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER,
AND McDONOUGH DISTRICT HOSPITAL,
AN ILLINOIS MUNICIPAL CORPORATION,
Petitioners,

v.

CHERYL R. CHURCHILL AND THOMAS KOCH, M.D.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
AMERICAN NURSES ASSOCIATION
IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Nurses Association (hereinafter ANA) respectfully moves this Honorable Court for leave to file the attached brief *amicus*. The attorneys for all respondents appearing in this case have consented to such filing. The attorney for Petitioner has declined to give such consent.

ANA is the only full-service professional organization representing the nation's 2.2 million Registered Nurses through its 53 constituent associations. ANA advances the nursing profession by fostering high standards of nursing practice, promoting the economic and general welfare of nurses in the workplace, projecting a positive and realistic view of nursing, and by lobbying the Con-

gress and regulatory agencies on health care issues affecting nurses and the public.

The First Amendment issue before the Court will have major implications on nursing practice in government or municipal health care settings. The right to criticize hospital policies which may impact the general public is an issue which has been addressed by this Court in prior proceedings. Nurses and other health care professionals are the best individuals to ascertain the necessity and proficiency of hospital policies and procedures which will directly effect patients and other individuals of the public sector. ANA has a vested interest in ensuring the equitable treatment of its constituents within the public and private health care industry. The grant of certiorari by the Court in this case emphasizes the national significance of the Court addressing the questions related to nursing and all health professionals.

The brief submitted with this motion will concentrate on the peculiar facts of this case as well as the national industry and professional standards of the nursing profession. In the brief tendered with this motion, ANA specifically defines and illustrates "floating" and "cross-training". While ANA explains these practices it also contrasts the procedures illustrating the necessary training required for cross-training, and the lack thereof with floating. These practices are performed nationally by hospitals in conjunction with its nursing staff and administrators. To elucidate these practices will enable the Court to better grasp the complex nature of the practice complained of, which in turn will allow the Court to understand the implications such criticism will have on the general public. Moreover, ANA will address public speech in the health care setting, particularly when the speech is communicated in a government or municipal hospital milieu. These are the major issues before the bench; ANA is submitting the attached brief in support of the Respondents and to explain issues before the Court in which ANA has recognized expertise.

WHEREFORE, it is respectfully prayed that this Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted.

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**QUESTIONS PRESENTED BY THE
AMERICAN NURSES ASSOCIATION**

- 1) Whether the "cross-training" program implemented by McDonough District Hospital provided care consistent with professional standards of nursing practice.
- 2) Whether an employer can terminate a registered nurse for communicating statements directly related to professional standards, quality of care, and the profession's ethical standards.
- 3) Whether a public employer can terminate an employee for communicating statements which were later discovered to be protected speech in the public interest.

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 IN SUPPORT OF RESPONDENTS

INTEREST OF THE
 AMERICAN NURSES ASSOCIATION

The questions presented in this case are relevant to the profession of nursing. One of the underlying issues—petitioner's "cross-training" policies—reaches the core of nursing practice. This policy represents a controversial approach to health care, which is often utilized without adequate review or consideration of its consequences. The American Nurses Association ("ANA") is the national federation of registered nurses comprised of 53 state and territorial constituent organizations representing approximately 2.2 million nurses who have an interest in adher-

ence to professional standards designed to protect patients and enhance nursing care.

ANA develops policies and professional standards of practice which are utilized by registered nurses throughout the United States. The state nurses associations ("SNAs") have extensive involvement in developing the national policies and standards of the nursing profession.

STATEMENT OF THE CASE

The respondent, Cheryl Churchill ("Churchill"), was a registered nurse employed at McDonough District Hospital ("Hospital"), a public hospital in Macomb, Illinois. Churchill began working at the Hospital in October 1982. During her tenure at McDonough she was assigned to the Obstetric Department of the Hospital.

In April 1986, the Hospital hired Kathleen Davis ("Davis") as the Vice-President of Nursing. Sometime in 1986 Davis instituted a "cross-training" policy. Cross-training usually allows health professionals to develop proficiency in a new area of practice. A properly designed cross-training program requires a nurse to receive adequate training and instruction so that new duties and tasks are performed safely and effectively. However, this cross-training was not implemented in this fashion. Instead, the cross-training policy developed by Davis called for nurses from one department, when over-staffed, to work an understaffed department within the hospital. "The institution of this new policy . . . trigger[ed] a certain amount of controversy and discussion among the medical and nursing staffs." (Pet. App. 32; see also *id.* at 6-3). Churchill was a staunch critic of the cross-training policy at the Hospital.

In August of 1986, while assisting in a "code pink"¹ Churchill was ordered by Cynthia Waters ("Waters"),

¹ A "code pink" is the term used in the obstetrics ward where there is an emergency or life threatening situation. When a "code pink" is issued, all available are required to assist the attending physician.

Churchill's supervisor, to go check on another patient. Waters arrived at the "code pink" sometime after Churchill and told Churchill "to take care of her (meaning Churchill) patients." In response to Waters' statements, Churchill replied "you don't have to tell me how to do my job." Subsequent to this event, Churchill was reprimanded through a written warning for insubordination.

In December 1986, Churchill's work performance evaluation was completed by Waters. The evaluation contained comments describing negative behavior by Churchill that "promotes an unpleasant atmosphere and hinders constructive communication and co-operation." Pet. App. 6. The evaluation indicated that Churchill's work was otherwise satisfactory. *Id.*

One month later, Churchill was overheard having a conversation with a cross-trainee. The subject of the conversation was the cross-training policy implemented by Waters and the Hospital. The conversation was overheard by Mary Lou Ballew, a nurse in the obstetrics department. Ballew reported the conversation to Waters, who reported to Davis, the Vice-President of Nursing, who reported this incident to Stephen Hopper, President of the Hospital.

Based on the reports of Davis and Waters, Hopper decided that Churchill should be fired. Davis informed Churchill that as a result of her conversation with "an employee" regarding the obstetrics department she was terminated. *Churchill v. Waters*, 977 F.2d 1114 at 1119 (1992). The specifics of the conversation are in dispute, but it was alleged that Churchill then criticized the obstetrics department for focusing on numerical coverage instead of quality of care. Davis told Churchill that she should have directed her grievances to Waters or herself. Churchill allegedly responded by telling Davis that she had voiced concerns about cross-training to Waters in the past. *Id.*

Churchill, dissatisfied with her termination filed a grievance pursuant to Hospital policy with Hopper and met

with him on February 6, 1987. Although Hopper participated in the discussions leading to the decision to fire Churchill, he met with Churchill and discussed 1) the code pink incident; 2) the negative comments on her December 1986 evaluation; and 3) Churchill's conversation with an unidentified cross-trainee in obstetrics. *Churchill*, at 1119. Hopper later sent Churchill a letter denying her grievance.

Churchill filed this action under 42 U.S.C. § 1983 in the United States District Court for the Central District of Illinois against the Hospital and the herein named petitioners. Churchill alleged that the Hospital fired her for exercising her right to free speech for criticizing the cross-training policy. Counts 1 and 3 of her complaint alleged that petitioners fired her in retaliation for her exercise of First Amendment rights. Count 2 claimed that the individual petitioners had deprived her of due process, and Count 4 alleged a state-law breach of contract claim against the Hospital. Churchill amended her complaint shortly thereafter asserting that her First Amendment right of free speech had been violated. The First Amendment and other ancillary issues are presently before this Court.

The District Court granted summary judgment in favor of the petitioners stating that the conversation was not protected speech. The 7th Circuit Court of Appeals reversed stating that Churchill's speech is a matter of public concern when viewed in the light most favorable to Churchill. The Circuit Court stated "Churchill's version of her statements, are that she was speaking out on improper nurse staffing policies * * * that endangered the quality of patient care, an issue that is most certainly a matter of public concern."

SUMMARY OF THE ARGUMENT

Central to any review of this case is a review of the actions at question. When a nurse expresses concern about practices and policies that may undermine the care of the patient and are inconsistent with the ethical and professional standards of nursing practice, that speech is protected through one's First Amendment rights or through public policy exceptions as defined by the state. *Winkleman v. Beloit Memorial Hospital*, 483 N.W.2d 211 (1992); *Pierce v. Ortho Pharmaceutical Corporation*, 84 N.J. 58, 417 A.2d 505 (1980). If public interests guide the action of the nurse, her actions are considered justified and protected. See *Warthen v. Toms River Memorial Hospital*, 199 N.J. Super. 18, 488 A.2d 229 (App. Div.) cert. denied, 101 N.J. 255, 501 A.2d 926 (1985). When the Hospital attempts to float nurses under the guise of cross-training, serious professional and policy implications arise.² The policy utilized by the Hospital has been inaccurately termed cross-training and is, in fact floating, a process which can be extremely unsafe if a nurse does not have adequate experience or training to move from one work setting to another.

² Cross-training is the concept of teaching nurses skills from other disciplines and specialty areas to allow them to work outside of their area(s) of expertise. Cross-training requires a program of clinical and/or classroom study, which may vary in length based on the educational level of the trainee nurse, the intensity of the training and the clinical area of the cross-training. Floating is the temporary movement of a nurse from one duty station to another, without any training program to ensure that the nurse is knowledgeable of the responsibilities of the new duty station. Registered nurses determine the scope of their practice in light of their education, knowledge, competency and experience, and are required to refuse work if they lack appropriate competence to fulfill the tasks associated with an assignment. ANA, Code for Nurses, Art. 6.2, floating is not a preferred approach to nursing care.

Churchill's discussions of the policy were not directed at individuals, but instead concerns about the process. Her speech, by all accounts was not directed at individuals, but instead at Hospital policy which was inconsistent with professional nursing's standards and code of ethics. See *Code for Nurses with Interpretive Statements* (ANA: 1985); *Nursing: A Social Policy Statement* (ANA: 1980); and *Standards of Clinical Nursing Practice* (ANA: 1991). Thus, this speech is not only protected, but it was conducted in a manner consistent with professional standards and Hospital policy.

Further, a public employer may not neglect its responsibility when it chooses to terminate an employee for engaging in speech which is later discovered to be protected speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968). While a hospital should be given latitude in maintaining a proper environment for the treatment of its patients, courts have recognized that a hospital should not be permitted to mask its arbitrary suppression of protected speech behind claims that the speech creates an anti-therapeutic situation. *Jones v. Memorial Hospital System*, 627 S.W. 2d 221 (Tex. App. 1984). In the motion for summary judgment, the District Court supported the concept that "when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free speech rights regardless of what the employer knew at the time of termination. See *Churchill v. Waters*, 977 F.2d 1114 at 1126 (1988) and *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). The petitioners have admitted that Churchill was discharged for engaging in what was later found to be "protected speech." *Churchill*, at 1119. However, petitioners also contend that they did not have a duty to determine or investigate whether the communications of Churchill were "protected speech." Yet the petitioners contend Churchill was fired for engaging in communication which

was found to be protected speech within the meaning of the U.S. Constitution. —

Churchill, prior to her termination, was a good employee with seven years of service. From the record she has no blemishes on her employment record other than the two infractions which the petitioners deemed warnings. Churchill, like any other citizen, is entitled to constitutional protection when the subject matter of her communications are a matter of public concern. The speech which provoked this lawsuit concerned the "cross-training policy of the Hospital. Churchill's major concern was the deficiency in the cross-training policy. The hierarchy within the Hospital was aware of Churchill's objections to this policy and neglected to rectify or address this issue. Churchill was terminated for voicing her objections which were protected by the First Amendment of the United States Constitution. Therefore, the Hospital is liable for the unlawful termination of Churchill.

The Court of Appeals in its decision held that the institutional petitioners were not entitled to qualified immunity. *Churchill*, at 1127. The authority for this holding rests with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the court stated:

Government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known'. (citation omitted) The principle behind the doctrine is that 'if the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.'

The petitioners seek to insulate themselves under the doctrine of qualified immunity based upon their ignorance.

The law in Illinois is clear³—Illinois indemnifies public employees from judgments against them for actions within the scope of their employment. Subsequently, the individual petitioners are not entitled to qualified immunity under Illinois law.

ARGUMENT

I. A "CROSS-TRAINING" PROGRAM IMPLEMENTED BY A HOSPITAL MUST ENSURE COMPETENT AND EFFECTIVE TRAINING TO GUARANTEE THE HEALTH AND SAFETY OF ITS PATIENTS AND STAFF

Hospitals must provide adequate and timely orientation and cross-training if a nursing member is assigned to more than one type of nursing unit. The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), *Accreditation Manual* (NC) Nursing Care §§ 2.3, 3.1 (1992).⁴ JCAHO through its accreditation manual has established the minimum criteria necessary for hospitals to implement a "cross-training" program. *Id.*

Cross-training aims to broaden the competencies of nursing personnel while rectifying the staff shortage problem in hospitals. Lyons, *Cross-Training: A Richer Staff for Leaner Budgets*, Nurs. Mang. (Jan. 1992). While nursing organizations vary on the length of time necessary to properly cross-train individuals, all agree the RN should be given adequate time to understand the scope of new practice, to develop skills and expertise of the new job and proficiency in the task. One nursing program believes that to maintain an effective cross-training program, a nurse should be assigned to a department for four to six weeks. *Id.* Vanderbilt University Hospital is an insti-

³ See, Ill. Rev. Stat. ch. 85 P 9-102 (1992).

⁴ The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") is a private, non-profit organization which has provided accreditation for about five thousand three hundred (5,300) hospitals and three thousand (3,000) other health care organizations.

tution which has implemented a viable cross-training program. The criteria for the Vanderbilt program are:

Employees are divided into teams of two. Each team includes at least one registered nurse and either a medical technologist, radiologic technologist, respiratory therapist or licensed practical nurse.

Any member of the team can handle the simplest tasks in each specialty such as teaching patients how to breathe deeply or drawing blood from patients. The most complicated tasks are performed by specialists in each area. Registered nurses are the only members with the authority to assess patients' overall progress.

The hospital developed practice parameters and care plans that teams modify when necessary to accommodate patients' needs. Teams care for a specific set of patients throughout patients' stays on the unit. *Modern Healthcare, Staff cross-training caught in cross fire*, p. 26 (May 1991).

Although the Vanderbilt plan cross-trains unlicensed assistive personnel and utilizes registered nurses in the capacity as a team leader, the overall structure of the program is similar to models used throughout the country.⁵

McDonough terms its actions "cross-training," when nurses are actually "floating" to different units within the hospital when that particular area was understaffed. Contrary to JCAHO standards and those enumerated by scholars within the nursing profession, McDonough's program does not establish continuity in the training agenda. The protocol under McDonough's policy called for nurses to float, or as McDonough coins the phrase "cross-train," only on an as-needed basis. *Churchill*, at 1116. Further, McDonough's "cross-training" program requires the nurse

⁵ For more examples of cross-training structure and design, see, Hast, A.S. & Serish, A. "Cross training programs in critical care", *Critical Care Nurse*, 6(6): 74-81 (Nov.-Dec. 1986).

to work in a new department on an "as needed" basis, with no stated duration or formal training. McDonough's policy is void of all JCAHO principals which are embodied in the accreditation manual.

The necessity of continually training under the cross-training method is to ensure competency and quality of the services provided to the patient. JCAHO *infra.*; Lyons, *infra.* Competent cross-training policies have come under much criticism. Strohbach, *Clinical Excellence and Cross-Training*, Am. J. Maternal Child Nurs. 17:65 (March/Apr. 1992). Although cross-training programs are designed to achieve competency in more than one clinical area, the time that a nurse is allotted to learn the new area is usually insufficient. *Id.*

A nurse who is properly cross-trained in a given field of practice is deemed to be competent in the field. A nurse may be subjected to tort liability if a patient is injured. Strohbach, *infra.* The American Nurses Association, *Code For Nurses With Interpretive Statements*, 5.1 (1985), states that: * * * [i]t is the personal responsibility and must be the personal commitment of each individual nurse to maintain competence in practice throughout a professional career * * *. *Id.*

II. "FLOATING" IS AN INAPPROPRIATE HOSPITAL POLICY FOR THE PURPOSES OF ALLEVIATING STAFF SHORTAGES

The practice of "floating" has been implemented by many hospitals to resolve short-staffing situations. O'Rielly, *Floating: A Reality And A Problem?*, Focus on Critical Care 14:3, p. 60 (1987). Although, JCAHO has codified the practice of nurse reassignment (NC) 2.3, 3.1 within the subheading of floating; in a practical sense the JCAHO standards connote "cross-training." Floating, in its practical application, involves the transferring of a nurse from one unit when other units in the hospital

are understaffed. Many nurses today are uncomfortable with "floating." O'Rielly, *id.* In fact, nurses have been terminated for refusing to float. *Francis v. Memorial General Hospital*, 726 P.2d 852 (N.M. 1986). In *Winkleman v. Beloit Memorial Hospital*, 483 N.W.2d 211 (Wi. 1992), a nurse was terminated for refusing to float from the nursery area to an area in the hospital involving post-operative and geriatric care patients. The basis for her refusal was that she lacked the training necessary to service the patients in that area. Winkleman was terminated for insubordination because of her refusal of "float." Winkleman sued for wrongful termination and was reinstated. A nurse, when accepting a task is imputing that he/she is competent to perform such tasks.

Nurses have been held to standards of care which reflect certain skills and expertise to provide specialized care. In one case, a nurse was held liable when she delegated the task of monitoring a patient to another nurse. When comparing the RN to the specialty physician provider—an anesthesiologist—the court held:

. . . that it was the job of the recovery room nurse to monitor the patient and that the doctor had not deviated from the medical standard in leaving the recovery room. . . . *Eyoma v. Falco*, 247 N.J. Super 435 at 440 (1991).

Moreover, the court has consistently held the nurse to a professional standard of care based on her education, skills and expertise within a particular setting. See *Lunsford v. Board of Nurse Examiners for the State*, 648 S.W.2d 391 (Tex. App. 3d District); *Murphy v. Rowland*, 609 S.W.2d 292 (Texas Civ. App. 1980).

Ethical and moral obligations prohibit a nurse from performing functions where the nurse has not had adequate training. See, ANA, *Standards of Clinical Nursing Practice* (1991). The ethical canons incorporated into nurse practice acts and the Code for Nurses published

by ANA prohibits nurses from accepting tasks which they are incapable of performing. The *Standards of Clinical Nursing Practice* are published by ANA, and provided, in part, in the Appendix of this brief.

These canons and standards direct a nurse in her/his daily work regimen and are based on an educational approach used by *all* schools of nursing. Although these standards are published by ANA, all state nurse associations ratified them⁶ and over 38 organizations have endorsed the 1991 revisions.⁷

A nurse can be placed in a precarious situation when accepting a floating assignment. First, there is the potential liability of the nurse working on a unit that is understaffed. The nurse may not be experienced in the patient care and technological skills unique to that unit. Moreover, the quality of patient care is compromised. An inexperienced nurse may not monitor or provide necessary care to the patient. In practical terms, "floating" does not serve the needs of the public nor the hospital. Competence and quality of care are circumscribed when floating is practiced.⁸

Churchill's criticism of the cross-training policy was recognized by the Circuit Court as "protected speech" within the meaning of the First Amendment of the U.S. Constitution. *Churchill*, at 1127. Specifically, Churchill contends that the program as implemented did not give the nurse adequate time to learn the skilled area to consider oneself "trained" or "cross-trained" in that par-

⁶ Churchill is a member of the Illinois Nurses Association which is an affiliate member of the American Nurses Association.

⁷ As indicated in the appendix, ANA has revised or developed 31 general or specialty nursing standards documents.

⁸ For more information on floating, see, "Cross-Utilization of Nursing Staff, *Nurs. Mang.* 24:7, pp. 38-39; and Cushing, Maureen, *Short Staffing on Trial*, 88 *Am. J. Nurs.* 2, pp. 161-162 (1988).

ticular area. Also these matters have a direct effect on the quality of patient care and accreditation of the hospital. The Hospital's program, like the programs mentioned in Strohbach's article do little to develop expertise and competence among the nursing staff. Inadequate time and training to develop necessary skills in a new field of practice are detrimental to the patient and expose the nurse to tort liability as well.

III. McDONOUGH'S "CROSS-TRAINING" PROGRAM IS DEFECTIVE AND VOID OF THE NATIONAL STANDARD AND ENDANGERS THE QUALITY OF CARE GIVEN TO ITS PATIENTS

Nurses who are assigned to more than one unit *must* be adequately trained to perform that particular function. JCAHO (NC) 2.3 requires nurses who are assigned to more than one type of nursing unit to be adequately trained and competent to perform such tasks. The Circuit Court ruled correctly when it determined that the Hospital's "cross-training" programs did not conform to JCAHO standards. *Churchill v. Waters*, 977 F.2d 1114 at 7th Cir. 1122 (1992). Although, the accreditation manual codifies NC 2.3. under the subheading of floating—it does not denote floating in its practical application. The Hospital's "cross-training" program is effectively a floating program. The objectives of floating have been addressed earlier in this brief. The objective of "cross-training" in its practical application is designed to ensure that the nurse is adequately trained and the patients receive quality health care.

As the Circuit Court noted "Churchill objected to the cross-training program not as a matter of policy but on the grounds that the cross-training was being implemented improperly, for rather than being assigned to a department for an organized training program on a regular schedule, nurses were assigned to other departments for cross-training only when their respective departments were over staffed vis-a-vis the nurse-patient ratio in the

particular discipline." *Churchill v. Waters*, 977 F.2d at 1116 (1992).

The implications of inadequately trained nurses are a matter of public concern. Speech communicated by government employees which address matters of public concern is protected speech within the meaning of the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1965). Moreover, the *Code for Nurses* prohibits nurses from engaging in tasks where they have not been adequately trained.

When a nurse receives additional training according to JCAHO standards and ANA guidelines, that nurse is competent to perform the additional duties of that new unit. Cross-training embodies the essential requisites of competence. To allow the Hospital to implement this program and punish Churchill for notifying the Hospital of its deficiencies and sharing her concerns with co-workers may have a chilling effect on the First Amendment.

IV. CHURCHILL'S CONVERSATION REGARDING THE HOSPITAL'S CROSS-TRAINING PROGRAM IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT BECAUSE IT ADDRESSES A MATTER OF PUBLIC CONCERN

It is well settled that a state may not condition employment "on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In analyzing whether a public employer's actions impermissibly infringe on free speech rights, the Supreme Court has adopted a multi-tier test. *Schalk v. Gallemore*, 906 F.2d 491, 494 (10th Cir. 1990); *Frazier v. King et al.*, 873 F.2d 820, 825 (5th Cir. 1989).

In the first tier of the test, the court must decide whether the speech at issue may be "fairly characterized as constituting speech on a matter of public concern."

Connick, 461 U.S. at 146; *Cf. Rankin et al. v. McPherson*, 483 U.S. 378, 384 (1987). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148; *Rankin*, 483 U.S. at 384-385. "It is clear that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values and is entitled to special protection'" *Smith v. Cleburne County Hospital, et al.*, 870 F.2d 1375, 1381 (quoting *Connick*, 461 U.S. at 146). However, where the speech touches on a matter of public concern and it is in conflict with "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," these interests must be balanced. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Cf. Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 285 (1977).

In balancing conflicting interests, the court will consider the manner, time, and place of the employee's speech, as well as the context in which the conflict arose. *Rankin*, 483 U.S. at 388; *Schalk*, 906 F.2d at 496. As part of its analysis, the Court has recognized as pertinent "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388; *Pickering*, 391 U.S. at 570-573.

If the speech is protected, the employee must then show that the speech was a substantial or motivating factor in the employer's adverse action. *Mt. Healthy*, 429 U.S. at 287. Finally, if the employee sustains this burden, the burden is shifted to the employer to show by a preponderance of the evidence that it would have made the same decision regardless of the protected speech. *Id.*

The Circuit Court has determined that the speech communicated by Churchill was protected speech as it relates to matters of public concern. *Churchill*, at 1127. Churchill was very concerned about the efficiency of the cross-training program implemented at McDonough. Ineffective or inadequate training programs have a direct effect on the quality of patient care. The Circuit Court has stated that these issues are surely a matter of public concern. *Id.*

In *Mt. Healthy*, Doyle, the respondent, made communications which were a matter of public concern and was discharged. However, Doyle's employment record established many grounds to negate the reissuance of his contract. The court in *Mt. Healthy* imposed a burden on the employee to show that the protected speech, in light of all other reasons for discharge, was a substantial or motivating factor for dismissal. In the instant case, Churchill had given her superiors notice of her concerns about the cross-training policy prior to receiving a warning for insubordination and an average work performance evaluation. When additional comments were made to a peer, Churchill was terminated. In fact, the Hospital has admitted that the speech was the motivating factor for Churchill's dismissal. *Churchill*, at 1119. Thus, if a *Mt. Healthy* analysis is completed, the court will find not one, but two bases for finding Churchill's speech protected.

A. Churchill's Conversation Regarding the Quality and Level of Nursing Care Provided by the Hospital Is a Matter of Public Concern

The evidence clearly demonstrates that Churchill's conversation focused on the quality and level of nursing care at the Hospital and was, therefore, a matter of public concern. As the Circuit Court found, "[t]here can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speak-

ing about matters of public concern." *Churchill*, at 1121. Thus, Churchill's conversation with other nurses almost entirely related to cross-training and inadequate staffing. During this conversation, Churchill expressed concern that the Hospital's cross-training program was not being implemented properly. Moreover, as the Circuit Court below noted, Churchill's discussion regarding the Hospital's cross-training program raised concerns as to whether the Hospital's implementation of the cross-training program actually complied with the accreditation standards promulgated by the Joint Commission on Accreditation of Healthcare Organizations. Thus, Churchill asserted the Hospital's cross-training policy "appears to have been implemented merely to meet the bottom-dollar concerns of the Hospital administration rather than the 'nursing care of patients.'" Clearly, this conversation touched on a matter of public concern as it can "be fairly considered as related to any matter of political, social, or other concern of the community." *Schalk*, 906 F.2d at 494, quoting *Connick*, 461 U.S. at 146. See, *Frazier v. King*, 873 F.2d 820, 825 (5th Cir. 1989) ("[T]he quality of nursing care given to any group of people . . . is a matter of public concern.")

Further, Churchill's statements were not made in the context of an ongoing personal employment grievance. See *Schalk*, 906 F.2d at 495. Churchill received good evaluations and believed that any deterioration in her relationship with her supervisor was due to Churchill's opposition to the Hospital's improper implementation of the cross-training program. As the Circuit Court found, Churchill's "actions fall far short of the actions of an insubordinate or problem employee." *Churchill*, at 1125. Moreover, Churchill indicated that she did not have a problem with her supervisor and did not make any derogatory comments about her during her conversation on the cross-training policy.

B. On Balance, Churchill's First Amendment Interest in Expressing Her Opinion About the Hospital's Cross-Training Policy Outweighs the Hospital Interest

It is clear that Churchill's interest in expressing her opinion about the Hospital's cross-training policy outweighed the Hospital's interests. As Churchill maintains, the purpose of her conversation was to bring the possible violation of state regulations to light and to discuss the risks to patients because of the inadequacy of the Hospital's cross-training policy. *Churchill*, at 1126. Further, as the Seventh Circuit notes, Churchill engaged in the conversation regarding the Hospital's cross-training policy in furtherance of her interest "in fulfilling her ethical duty as a nurse to speak out on what she believes to be a matter of public concern that is related to the safety and proper care of the patients entrusted to her care." *Id.* *Code for Nurses*, Canon 6.

The importance of Churchill's ethical responsibility becomes more apparent when viewed against the Hospital's interest. The Hospital claims that Churchill's conversation interfered with its "need to maintain discipline or harmony among co-workers" and "the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972). However, as the Seventh Circuit determined, this interest could not possibly outweigh Churchill's interest in "speaking out on important matters of public concern." *Churchill*, at 1128. And, this interest does not outweigh the standards of Churchill's profession. As we have indicated above, Churchill's actions were not the actions of an insubordinate or disruptive employee. *Churchill*, at 1125. Rather, Churchill had "identified and was trying to do something about the problems that had

the potential of having detrimental effects on her patients—charging untrained nurses with patient care in obstetrics, understaffing the hospital and interfering with the duties of competent nurses in obstetrics as the result of assigning cross-trainees with a lack of education and skill to them." *Id.* Thus, Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional . . . clearly outweigh the hospital's interest in interfering and ultimately preventing her from speaking out . . ." *Id.*

V. HOSPITAL ADMINISTRATORS ARE NOT ENTITLED TO IMMUNITY WHEN THEY HAVE VIOLATED THE RIGHT TO FREE SPEECH OF ONE OF THEIR EMPLOYEES

Illinois law indemnifies public employees when they have been found to have violated a person's constitutionally protected rights while acting within the scope of their employment. Ill. Rev. Stat. ch. 85 P 9-102 (1993). The very existence of the statute is a tacit acknowledgement that individuals while acting in their administrative capacity are liable for violations of the rights of others. *Id.* Many courts have held government employers personally liable when they were found to have infringed the constitutional rights of others. *Commonwealth of Pennsylvania v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (1973); 107 A.L.R. Fed. 21 § 42(a) (1992). In *Philadelphia Psychiatric Center*, the hospital and its administrators were held liable for discharging an employee when the court ruled that they had violated her constitutionally protected right of free speech. The employee was reinstated and received a monetary award.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the American Nurses Association supporting the respondents requests that this Honorable Court affirm the Circuit Court opinion.

Respectfully submitted,

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APPENDIX

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STANDARD 1. QUALITY OF CARE

THE NURSE SYSTEMATICALLY EVALUATES THE QUALITY AND EFFECTIVENESS OF NURSING PRACTICE.

Measurement Criteria

1. The nurse participates in quality of care activities as appropriate to the individual's position, education, and practice environment. Such activities may include:
 - *Identification of aspects of care important for quality monitoring.
 - *Identification of indicators used to monitor quality and effectiveness of nursing care.
 - *Collection of data to monitor quality and effectiveness of nursing care.
 - *Analysis of quality data to identify opportunities for improving care.
 - *Formulation of recommendations to improve nursing practice or client outcomes.
 - *Implementation of activities to enhance the quality of nursing practice.
 - *Participation on interdisciplinary teams that evaluate clinical practice or health services.
 - *Development of policies and procedures to improve quality of care.
2. The nurse uses the results of quality of care activities to initiate changes in practice.
3. The nurse uses the result of quality of care activities to initiate changes throughout the health care delivery system, as appropriate.

STANDARD II. PERFORMANCE APPRAISAL

THE NURSE EVALUATES HIS/HER OWN NURSING PRACTICE IN RELATION TO PROFESSIONAL PRACTICE STANDARDS AND RELEVANT STATUTES AND REGULATIONS.

Measurement Criteria

1. The nurse engages in performance appraisal on a regular basis, identifying areas of strength as well as areas for professional/practice development.***

*****STANDARD V. ETHICS**

THE NURSE'S DECISIONS AND ACTIONS ON BEHALF OF CLIENTS ARE DETERMINED IN AN ETHICAL MANNER.

Measurement Criteria

- ***3. The nurse acts as a client advocate.***

*****STANDARD VI. COLLABORATION**

THE NURSE COLLABORATES WITH THE CLIENT, SIGNIFICANT OTHERS, AND HEALTH CARE PROVIDERS IN PROVIDING CLIENT CARE.

Measurement Criteria

1. The nurse communicates with the client, significant others, and health care providers regarding client care and nursing's role in the provision of care.
2. The nurse consults with health care providers for client care, as needed.
3. The nurse makes referrals, including provisions for continuity of care as needed.***

*****STANDARD VIII. RESOURCE UTILIZATION**

THE NURSE CONSIDERS FACTORS RELATED TO SAFETY, EFFECTIVENESS, AND COST IN PLANNING AND DELIVERING CLIENT CARE.

Measurement Criteria

1. The nurse evaluates factors related to safety, effectiveness, and cost when two or more practice options would result in the same expected client outcome.
2. The nurse assigns tasks or delegates care based on the needs of the client and the knowledge and skill of the provider selected.
3. The nurse assists the client and significant others in identifying and securing appropriate services available to address health-related needs.

STANDARDS PUBLISHED BY
AMERICAN NURSES ASSOCIATION

Standards of Nursing Practice	1973
Standards of Medical Surgical Nursing Practice	1974
Standards of Orthopedic Nursing Practice	1975
Standards of Neurological and Neurosurgical Nursing Practice	1977
Standards of Urological Nursing Practice	1977
Standards of Pediatric Oncology Nursing Practice	1978
Outcome Standards for Cancer Nursing Practice	1979
A Statement of the Scope of Medical-Surgical Nursing Practice	1980
Standards of Cardiovascular Nursing Practice	1981
Standards of Perioperative Nursing Practice	1981
Standards of Psychiatric-Mental Health Nursing Practice	1982
Standards for Organized Nursing Services	1982
Outcome Standards for Rheumatology Nursing Practice	1983
Standards for Maternal-Child Health Nursing Practice	1983
Standards for Professional Nursing Education	1984
Standards for Continuing Education in Nursing	1984
Standards for the Perinatal Nurse Specialist	1985
Standards of Child and Adolescent Psychiatric and Mental Health Nursing Practice	1985
Standards of Nursing Practice in Correctional Facilities	1985
Standards of Rehabilitation Nursing	1986

Orthopedic Nursing Process: Process and Outcome Criteria for Selected Diagnoses	1986
Standards of College Nursing Practice	1986
Standards of Community Health Nursing Practice	1986
Standards of Home Health Nursing Practice	1986
Standards and Scope of Gerontological Nursing Practice	1987
Scope and Standards of Hospice Nursing Practice	1987
Standards of Oncology Nursing Practice	1987
Standards of Practice for the Primary Health Care Nurse Practitioner	1987
Standards of Additions Nursing Practice with Selected Diagnoses and Criteria	1988
Standards for Organized Nursing Services (revised)	1988
Standards for Nursing Staff Development	1990
Standards of Clinical Nursing Practice	1991

The following state nurses' associations have agreed to sign onto the amicus brief of the American Nurses Association, supporting the respondent Cheryl Churchill.

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